ORDER NO: E15-57

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

KENNETH E. KOBYLOWSKI, COMMISSIONER NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE Petitioner, v. SECURE TITLE, INC., AND CHRISTOPHER HILDERBRANDT, Respondents.	OAL DKT. NO.: BKI 16461-13 AGENCY DKT. NO.: OTSC #E13-68 FINAL DECISION AND ORDER

This matter comes before the Commissioner of Banking and Insurance ("Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1, N.J.S.A. 17:1-15 and the Insurance Producer Licensing Act of 2001, N.J.S.A. 17:22A-26, et seq. (the "Producer Act"), and all powers expressed or implied therein, for the purpose of reviewing the Initial Decision of Acting Director and Chief Administrative Law Judge Laura Sanders ("ALJ") rendered on October 20, 2014 ("Initial Decision") and the Order on Motion for Summary Decision rendered on July 2, 2014 ("Partial Summary Decision"). The ALJ initially granted partial summary decision to the Department of Banking and Insurance ("the Department") as to liability but not penalty on one of four counts (Count Three) alleged in the Department's Order to Show Cause No. E13-68 ("OTSC") against Respondents Christopher Hildebrandt ("Hildebrandt") and Secure Title Inc. ("Secure Title"), (collectively "Respondents"). Thereafter, a hearing was held on the remaining counts and resulted in issuance of the Initial Decision. In the Initial Decision, the ALJ found that Department proved the allegations in Counts One, Two and Four, recommended the revocation

of Respondents' licenses, the imposition of fines of $8,000, costs of $887.50 and restitution of $5,523, all joint and severally.

PROCEDURAL HISTORY

On July 15, 2013, the Department issued the OTSC against Respondents seeking to revoke their insurance producer licenses and to impose civil penalties and costs of investigation for alleged violations of the Producer Act. The OTSC was sent to Respondents on October 3, 2013. In the OTSC, the Department alleges that Respondents engaged in the following activities in violation of the insurance laws of this State:

> Count 1 - On or about July 17, 2007, Respondents transmitted a financial instrument for which they did not have sufficient funds to cover, in violation of N.J.S.A. 17:22A-40a(2), (8) and (16);
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> Count 2 - Respondents failed to remit escrow funds and used fraudulent, coercive and dishonest practices, demonstrated incompetence, untrustworthiness and financial irresponsibility in the conduct of business in violation of N.J.A.C. 11:17C-2.2(c), which caused Old Republic National Title Insurance Company ("Old Republic") to reimburse the escrow funds;
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> Count 3 - Respondents failed to keep separate records of funds held in escrow, and comingled escrow funds with other funds held by the Respondents in another capacity, in violation of N.J.S.A. 17:22A-40a(2) and (8), N.J.S.A. 17:46B-10.1, N.J.A.C. 11:17A-4.10, and N.J.A.C. 11:17C-2.1(a); and
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> Count 4 – Respondents failed to respond to the Department's two written inquires within the time required, in violation of N.J.S.A. 17:22A-40a(2), and N.J.A.C. 11:17A-4.8.

Thereafter, Respondent Hildebrandt filed an Answer, pro se, denying the violations alleged in the OTSC, and requesting a hearing. The Department transmitted the contested case to the Office of Administrative Law ("OAL") on November 14, 2013, pursuant to N.J.S.A.

52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. By letter dated January 20, 2014, Steven Secare, Esq. filed a letter of appearance on behalf of Respondent Hildebrandt.[1]

On June 3, 2014, the Department filed a Motion for Summary Decision.[2] Respondent filed opposition to the motion on June 13, 2014. The Department filed a reply on June 26, 2014. On July 2, 2014, the ALJ issued an Order Granting Partial Summary Decision. Specifically, the ALJ determined that Counts One, Two and Four of the OTSC were inappropriate for summary decision, but granted summary decision on Count Three. As to Count Three, the ALJ found that the mere act of releasing a check that was dishonored for insufficient funds constituted, at a minimum, illegally withholding funds, and that the undisputed facts established that the Department met its burden with regard to summary decision on Count Three. However, the ALJ found that problems with context and missing information made establishment of a penalty on Count Three inappropriate.

On September 8 and 9, 2014, a hearing was held and the record closed on September 9, 2014. After the record closed, the Department raised a new argument that the arrangement between Respondent Hildebrandt and his father (John Hildebrandt) should be considered when evaluating whether revocation of his license is warranted. On September 22, 2014, the Respondents replied contending that the father's efforts to help his son were irrelevant to the question of the son's licensure. The record was reopened to admit the Department's new arguments and the exhibit (labeled P-43), and then closed on September 22, 2014.

On October 20, 2014, the ALJ issued the Initial Decision. The ALJ found that Respondents violated N.J.S.A. 17:22A-40a(8) (prohibiting financial irresponsibility) as alleged

[1] Although in the letter of appearance Mr. Secare states that he represents Respondent Hildebrandt and is silent as to Respondent Secure Title, other submissions (including Respondents' opposition to the Motion for Summary Decision and Respondents' Exceptions) indicate that Mr. Secare represents both Respondents.
[2] The Department submitted a revised Motion for Summary Decision on June 5, 2014, with the consent of the Respondents' attorney.

in Count One of the OTSC; and N.J.A.C. 11:17C-2.2(c) as alleged in Count Two of the OTSC. The ALJ also found that the prior Partial Summary Decision concluded that: the mere act of releasing a check that was dishonored for insufficient funds constituted illegally withholding funds as alleged in Count Three of the OTSC; and Hildebrandt did not respond to the Department's inquiries within the fifteen calendar day timeframe as alleged in Count Four of the OTSC. The ALJ recommended the revocation of Respondents' licenses; and that Respondents are jointly and severally liable for payment of penalties of $2,000 for Count One; $3,000 for Count Two; $1,000 for Count Three; $2,000 for Count Four; costs of $887.50 and restitution to Old Republic of $5,523.

TESTIMONY AT THE OAL HEARING

John Hildebrandt

The ALJ noted that there was no real challenge to John Hildebrandt's testimony; thus, the ALJ found the following as fact. Initial Decision, 2014 N.J. Agen LEXIS 725, at *6. John Hildebrandt, Respondent Hildebrandt's father, acted as a consultant and an office manager to Respondent Hildebrandt's business, but was not typically paid for his efforts. Id. at *4. John Hildebrandt's license as an insurance producer was revoked by the Commissioner on February 3, 1993. Ibid. He also had a prison sentence as a result of his business dealings. Id. at *4-5.

John Hildebrandt admitted that no one at Secure Title knew how to use the segment of the computer system that managed the trust-fund accounting. Id. at *5. Secure Title relied on Old Republic to reconcile accounts. Ibid.

An estimated 7,000 to 8,000 titles were insured through Secure Title during the time the business was operating. Ibid. On one of these, in January 2006, Secure Title sent a representative named Robert Taub to conduct a closing on a transaction involving Bartolomeo

Buono ("Buono"). Id. at *5-6. Taub was to receive a bank check or certified check for the $41,475.01 due at closing, but the check was paid to the new lender. Id. at 5. Buono promised to make the proper deposit, but never did so. Ibid.

In January of 2007, the Old Republic auditor told Hildebrandt that the Buono deposit of $41,475.01 was missing. Id. at *6. In an action between Old Republic and Secure Title, Secure Title and Respondent Hildebrandt counter-claimed over the ineptness of the Old Republic auditor, and they expect to receive $22,000 over the accounting error as part of an overall settlement. Id. at *5-6.

Christopher Hildebrandt

The ALJ found that nothing created a serious challenge to Respondent Hildebrandt's testimony; thus, the ALJ found the following as fact. Id. at *8. Respondent Hildebrandt testified that Buono faxed a copy of a check to Secure Title and represented to Respondent Hildebrandt that Buono had deposited the check in Commerce Bank, which was also the bank used by Secure Title. Id. at *6. No one at Secure Title checked to see whether the deposit was there. Ibid.

Secure Title relied upon the auditing services provided by Old Republic, with which Secure Title did the majority of its business. Ibid. The contract between Secure Title and Old Republic provided that at Old Republic's option, it would conduct "period (sic) audits of Agency's policy inventory, title insurance files ... records or accounts, including financial and business records." Ibid. An audit conducted on March 14, 2005 by Old Republic noted that: another auditor would make a follow-up appointment to place Secure Title on the bank reconciliation program; the agency remitted $10,328 in 2005; the trust account was opened on September 30, 2004; the trust account had not been reconciled since it was opened until March 14, 2005. Id. at *6-7.

Once the Old Republic auditor flagged the problem with the Buono deposit, he contacted Buono, but Buono never made good on the deposit. Id. at *7. In mid-July 2007 when Secure Title issued the $5,000 check to the Christies ("the Homeowners"), the account had sufficient money to cover the check. Ibid. The Homeowners, however, took more than three months to cash the check and other checks cleared leaving the account with a deficiency. Ibid. Respondent Hildebrandt advised the Homeowners to contact Old Republic for their funds. Ibid.

Respondent offered evidence that he was a victim of fraud by Buono – the Order for Final Judgment against Buono for compensatory damages of $41,475.01, punitive damages of the same amount, counsel fees, cost of suit, and pre-judgment interest. Id. at *7-8.

Edward Azar, Esq.

The ALJ found the testimony of Edward Azar, Esq. to be credible. Id. at *9. Azar testified that in early January 2007, he was contacted by the Homeowners for help in obtaining the release of $18,023 being held in escrow by Respondents following a refinancing. Id. at *8. On July 17, 2007, Secure Title sent a check for $5,000, which was returned for insufficient funds on November 16, 2007. Id. at *9. Secure Title never made good on the $5,000; rather, Old Republic forwarded $18,023 on March 20, 2008. Ibid. Azar stated that Hildebrandt told him that the money otherwise due to the Homeowners had been used to pay costs for another transaction. Ibid.

Linda Gleghorn

Linda Gleghorn, a Department investigator, testified. Id. at *10. She testified that she contacted Respondent Hildebrandt on June 20, 2011 to discuss the problem with the $18,023 escrow. Ibid. Respondent Hildebrandt told her that the money had been taken in another closing, the files were in storage, and he would contact his attorney before answering her inquiry.

Ibid. On June 20, 2011, Gleghorn followed-up with a fax to Respondent Hildebrandt. Ibid. On November 3, 2011, she followed-up with a phone call but did not receive a commitment on the time when a response would be forthcoming. Ibid. On February 3, 2012, she followed-up with a second letter seeking information. Id. at *11. This letter also went unanswered. Ibid.

THE ALJ'S FINDINGS OF FACT

The ALJ found that there was no dispute as to the following facts. Hildebrandt was licensed as a resident individual insurance producer from March 28, 2003, until the expiration of his license on January 31, 2009. Id. at *2-3. Secure Title was licensed as a resident business entity insurance producer from August 16, 2004, until July 31, 2008. Id. at *3. From August 16, 2004 to July 31, 2008, Hildebrandt was the only designated responsible licensed producer at Secure Title. Ibid. Pursuant to an agreement with Old Republic, Secure Title was a policy-issuing agency for Old Republic. Ibid. On December 7, 2006, Hildebrandt conducted a closing related to the refinancing of a home owned by the Homeowners. Ibid. At the closing, the title search revealed that there were liens against the property due to judgments filed against the Homeowners. Ibid. To resolve the outstanding judgments and liens encumbering the title, Respondents entered into a settlement agreement with the Homeowners, and as part of that agreement, held in escrow $18,023. Ibid. In or about July 2007, about six months after the closing, on release of one of the judgments, Respondent Secure Title sent a $5,000 check from its escrow account that was dishonored for insufficient funds. Ibid. By letter dated March 20, 2008, Old Republic forwarded a March 17, 2008, check for $18,023 to Edward Azar, Esq., counsel for the Homeowners. The letter stated "[t]his amount equals the funds held in escrow by Secure Title." Id. at *3-4.

Additionally, the ALJ found that although the Old Republic auditor advised Respondents of the missing Buono funds in January 2007, only a month after the December 2006 escrow of the Homeowners' funds, nothing was done to prevent the commingling of those funds with other funds. Id. at *9-10. Funds from various transactions were essentially being rolled from one client to another until a decline in business meant new cash was not available to cover older obligations. Id. at *10.

The ALJ also found that Respondent did not respond to the Department's two written requests for information – one on June 20, 2011 and the other on February 3, 2012. Id. at *11.

ALJ's LEGAL ANALYSIS AND CONCLUSIONS

The ALJ determined that the Department should prevail on all Counts of the OTSC. Count One of the OTSC alleges that a check was not backed by the proper escrow funds, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility) and (16) (commit a fraudulent act), and N.J.A.C. 11:17A-4.10 (a producer acts in a fiduciary capacity). The ALJ found that the following were financially irresponsible behaviors in violation of the insurance laws, specifically N.J.S.A. 17:22A-40a(8) (prohibiting financial irresponsibility): failing to reconcile the trust account for six months; no one at Respondent Secure Title knew how to use the segment of the computer system that managed the trust-fund accounting; no one bothered to ascertain that Buono, who had already been a problem, actually did deposit a valid check and this failure of diligence caused the release of a check without the funds to back it.

Count Two of the OTSC alleges that Respondents violated N.J.A.C. 11:17C-2.2(c) (title insurance settlement funds shall be disbursed within five business days after settlement except as determined by the parties). The ALJ found that the Settlement Escrow Agreement required

$18,023 in escrowed funds to be paid to the Homeowners upon satisfaction of amounts verified in writing, and that the Homeowners satisfied conditions for the release of $5,000 on or about July of 2007, but that Secure Title, as a result of its failure to follow up on the Buono check could not pay the funds in the required time frame. The ALJ concluded that the Department proved the allegations in Count Two.

Count Three of the OTSC alleges that Respondents violated N.J.S.A. 17:22A-40a(2) (violating any insurance law) and (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), N.J.S.A. 17:46B-10.1 (maintaining a separate trust or escrow account, no commingling), N.J.A.C. 11:17A-4.10 (a producer acts in a fiduciary capacity) and N.J.A.C. 11:17C-2.1(a) (premium funds shall be held in a fiduciary capacity and shall not be misappropriated, improperly converted or illegally withheld). The Order for Partial Summary Decision concluded that the mere act of releasing a check that was dishonored for insufficient funds did constitute illegally withholding funds.

Count Four of the OTSC alleges that Respondents violated N.J.S.A. 17:22A-40a(2) and N.J.A.C. 11:17A-4.8 (failure to timely reply to two Department written inquiries). The ALJ found that the previous Partial Summary Decision established that Respondent Hildebrandt did not respond within the fifteen-calendar-day timeframe to two Department inquires.

ALJ'S FINDINGS AS TO THE PENALTY

The ALJ determined that monetary penalties, costs, the payment of restitution and license revocation were appropriate in this matter. The ALJ noted that there are seven factors that State agencies evaluate when imposing administrative fines as set forth by the New Jersey Supreme Court in Kimmelman v. Henkels & McCoy, 108 N.J. 123, 137-39 (1987). In considering the seven Kimmelman factors, the ALJ made the following determinations. This is not an instance

of carefully premeditated fraud, but rather financial sloppiness rising to fiscal irresponsibility. Next, the ALJ found that no evidence concerning ability to pay was presented, but Secure Title ceased to do business in 2008, and Respondent Hildebrandt is now back in college, both of which suggest a limited ability to pay. The ALJ found that no evidence concerning profits from illegal activity was presented but evidence of efforts to recoup amounts due to Respondents was presented. The ALJ noted that the public harm included the efforts required by the Homeowners to recover funds held in escrow by Respondents, as well as the need for Old Republic to pay out funds for the $18,023, plus $2,500 in legal fees. In addition, Respondent Hildebrandt mentioned that he thought Old Republic owed approximately $8,000 to another couple, who were also shorted. The ALJ concluded the problem appears to be limited to two transactions totaling approximately $29,000, and that the problem lasted eleven (11) months. The ALJ found that no evidence of criminal action exists; nor is there evidence that Respondents committed previous violations.

As to Count One, the ALJ found that a penalty of $2,000 was warranted. The ALJ relied upon Commissioner v. Capital Bonding Corp., OAL Dkt. No. BKI 6793-01, Initial Decision (07/02/04), Final Decision and Order (11/17/04), aff'd, Dkt No. A-1903-04T3 (App. Div. 08/01/06), wherein the Commissioner fined Respondents $2,000 each for sixteen checks totaling $762,728, but did not find that Respondent's activity rose to the level of willfulness, but at a minimum evidenced careless conduct demonstrating financial irresponsibility in violation of N.J.S.A. 17:22A-17a(20).

As to Count Two, the ALJ concluded that a $3,000 penalty is warranted because of the long period of time, between January 2007 and November 2007, when the check to the

Homeowners was dishonored while the Respondents had a significant time to sort it out but did not.

With regard to Count Three, the ALJ concluded that a $1,000 fine is appropriate because there are mitigating circumstances, which include the Superior Court's determination that Buono defrauded Respondents, that Respondent Hildebrandt was relying on the Old Republic auditor (which is different that ignoring the account entirely) and the failure by the auditor to notice the missing funds for months.

As to Count Four, the ALJ concluded that a $1,000 fine for each violation (two violations) is appropriate. The ALJ noted that Respondent Hildebrandt argued that he tried to explain the alleged Buono fraud to the Department Investigator, but that she had little interest in his explanation. The ALJ found the fact that a producer disagrees with the Department's opinion concerning the adequacy of a verbal explanation does not constitute grounds for ignoring a Department Inquiry letter. Similarly, the existence of other ongoing civil matters does not require a waiver of the Department's regulations. Moreover, the ALJ considered that the final order involving the fraud was issued on March 18, 2011, and the Department's inquiry letters were released in June 2011 and January 2012.

Additionally, the ALJ concluded that the Department is due costs of $887.50, and Old Republic is due full restitution of $5,523.[3] Thus, the total amounts due from the Respondents, as recommended by the ALJ, total $8,000 in fines, $5,523 in restitution and $887.50 in costs.

With respect to license revocation, the ALJ recommended that Respondents' licenses be revoked. The ALJ noted that Respondent Hildebrandt pleads that the loss of his license would be a draconian measure given that he was the victim of a fraud and that he relied on the audit

[3] Old Republic paid the amount of $18,023 to reimburse the Homeowners, and recovered $12,500 from Respondent Secure Title's Errors and Omissions insurance carrier; thus, a balance of $5,523 is owed by Respondents. See Exhibit P-8, ¶8 and ¶10.

services of Old Republic. The ALJ also noted that the Department argues that the involvement of Respondent Hildebrandt's father is a factor supporting revocation because under N.J.A.C. 11:17D-2.5, no person whose license has been suspended or revoked may be employed in any capacity by an insurance producer. It is uncontested that the license of Respondents' father, John Hildebrandt, was revoked, and that he responded, "[t]ypically no," when asked about payment for services performed for Respondents, which implies he did receive some financial benefit from his arrangement with Respondents.

The ALJ cited to the final decision in Fonseca which notes that "[i]n previous decisions, license revocation has consistently been imposed on licensees who have personally engaged in fraudulent acts in their capacity as insurance producers." Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). Because revocation is not a permanent bar, as reinstatement may be sought within five years under N.J.A.C. 11:17D-2.7, it is imposed more frequently than in fields where reinstatement is not possible. The ALJ further avers that the Fonseca decision cites numerous final decisions, "all of which discuss the public policy and legal grounds that support the conclusion that only in very rare cases involving extraordinary mitigating factors would it be appropriate to refrain from revoking the license of an insurance producer found to have committed insurance fraud." Ibid. The ALJ noted that agency decisions support the concept that "fraud" in this context is not criminal fraud; rather the ongoing knowledge of the shortage in the trust account is sufficient misconduct to constitute fraud under the Producer Act. Thus, the ALJ concluded that the combination of factors supports revocation of the Respondents' licenses.

EXCEPTIONS OF RESPONDENTS

The Respondents timely filed Exceptions, dated October 24, 2014. The Respondents concur with the ALJ determination that there was no intentional fraud in this matter, but that at the most their actions amounted to negligence. Respondents take Exception to two findings. First, Respondents argue that the failure to cooperate with the Department was not a failure to cooperate but merely done at the advice of counsel because of a potential criminal case pending with the Ocean County Prosecutor's Office that was ultimately cleared. Next, Respondents argue that revocation is too severe given the facts and circumstances of this case and that no suspension should be imposed.

EXCEPTIONS OF PETITIONER

The Department timely filed exceptions, dated October 31, 2014. The Department concurs with the overall conclusion of the ALJ in finding that Respondents violated the Producer Act as alleged in the four count OTSC and recommending the revocation of the Respondents' insurance producer licenses. However, the Department wished to clarify several issues as follows.

> 1.) Respondents' reliance on Old Republic's auditor, and the auditor's failure to notice the missing funds for months is not a mitigating circumstance, but should be an aggravating factor in support of a higher penalty;
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> 2.) The Initial Decision conflicts on whether or not Respondents' conduct was fraud. Respondents' conduct constitutes fraud under the Producer Act; and
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> 3.) The appropriate penalty for Count Three of the OTSC should be $10,000, not $1,000.

First, the Department avers that Respondents' reliance on Old Republic's auditor should have been an aggravating circumstance in factoring penalties. The Department claims that the

Initial Decision should have noted relevant portions of the agency agreement, introduced by Petitioner into the record as P-29 which, among other things, states in Section III, E, that it is the duty of the agent to "reconcile all [trust] accounts not less than monthly." Section IV, titled "Duties of Insurers" is silent as to duties regarding audits or reconciliation of Respondents' account.[4] The Department states that Section XI, A, states that Old Republic may, at its option, conduct audits of Respondents' accounts, but that escrow or settlement business is strictly the responsibility of the Respondents. The Department argues that the agency agreement leaves no doubt that it was Respondents' responsibility as title agents to reconcile their own books and that their failure to do so was in negligent disregard to their agency agreement.

Continuing, the Department argues that Respondents' reliance on Old Republic to audit the escrow account was not reasonable, but rather purposefully negligent because they used it as an excuse to not reconcile their own account. N.J.A.C. 11:17C-2.5(g) requires producers to prepare and maintain a monthly reconciliation of their trust account. Reliance on a third party to reconcile the producer's trust account lowers the standard for New Jersey producers.

Next, the Department argues that the Commissioner should reconcile the inconsistency in the Initial Decision as to whether the Respondents' conduct was an act of fraud under the Producer Act. The Department avers that the Initial Decision's penalty section states that "this is not an instance of carefully premeditated fraud, but rather financial sloppiness rising to fiscal irresponsibility." The Department claims that this language contrasts with the Initial Decision's discussion regarding license revocation wherein it quotes that license revocation has consistently been imposed for those engaged in fraudulent acts. Furthermore, the Initial Decision correctly applies the definition of fraud in the agency to this case by stating that "the ongoing knowledge

[4] The Exceptions state that it is Section VI. titled "Duties of the Insurer;" however, it is Section IV. that is so titled. (P-29).

of the shortage in the trust account is sufficient misconduct under the [Producer] Act." While noting the criminal context of fraud is not applicable, the Department states that under the Producer Act fraud is defined as:

> A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture. A generic term embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonyms of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc. Commissioner Fortunato v. Shih, Initial Decision, 94 N.J.A.R. 2d (INS) 34 (03/02/94) (citing Black's Law Dictionary 660 (6th ed. 1990)), Final Decision (04/14/94) [emphasis added].

The Department asserts that a fraudulent act under the Producer Act does not require intent to deceive. Commissioner v. Pino, supra, OAL Dkt. No. BKI 8070-02, Initial Decision (09/11/03), Final Decision and Order (10/30/03) (there is no mens rea requirement for violations of the Producer Act).

Next, the Department avers that the appropriate penalty for Count Three should be $10,000, not $1,000 as recommended by the ALJ. Count Three charges that Respondents illegally withheld approximately $18,000 from the Homeowners. The Department argues that the ALJ incorrectly concluded that Respondents' actions were mitigated by two circumstances: that Respondents were defrauded by another causing their trust account to overdraw, and that they reasonably relied upon Old Republic's auditor to catch accounting errors.

The Department avers that the Respondents had the duty to properly account for funds in the escrow accounts. Considering the facts underlying Count Three, the alleged third party fraud, Old Republic's agency agreement, and the correct standard for fraud, analysis under Kimmelman, supra, should have resulted in a substantially higher penalty than the $1,000 assessed by the ALJ.

As to the Kimmelman factors, the Department argues as follows. As to the good or bad faith of the violator, the Respondents were acting in bad faith from the time they learned the account was deficient because of the failure of Buono to deposit a check until the time when their account was negative in balance. They took no action to protect consumer's escrow deposits. As to the violator's ability to pay, beyond the assertions that Secure Title went out of business 2008 and that Respondent Hildebrandt is now in college, Respondents provided no proof of their inability to pay. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity (see Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08)). As to the amount of profit obtained, Respondents profited from their illegal activity by approximately $18,000 because they never paid or reimbursed anyone that amount. Respondents' trust account was short in an amount at least equal to the amount they received but could not return to the Homeowners, Old Republic refunded the Homeowners the amount equal to their remaining escrow balance, and Respondents' errors and omissions carrier paid Old Republic $12,500 in relation to the Homeowners' loss. As to the injury to the public, the Initial Decision correctly notes the harm caused by Respondents to the Homeowners for the efforts they had to make and the duration of time they had to undertake to recover said funds. Moreover, the Commissioner may assess less tangible forms of harm, including that the confidence of New Jersey consumers in the insurance

business has been eroded by the egregious acts of Respondents while acting as licensed title agents. As to the duration of the illegal conduct, Respondents' illegal activity was longer than 11 months because the trust account was first deficient in January 2006, when Respondents should have first known their trust account was deficient due to the alleged third party fraud, until they could not return Homeowners' money in November 2007, a period of 23 months. No criminal charges were brought against Respondents and therefore they have not been punished for any of their illegal activity. Finally, the Initial Decision correctly notes that these are the first violations of the insurance laws by Respondents.

For the reasons provided above, the Department argues that the Initial Decision should be modified as follows: 1) a finding that the evidence of Respondents' reliance on Old Republic's auditors aggravates rather than mitigates in favor of harsher penalties; 2) the correct standard of fraud for producer actions should be enunciated and applied to this matter, and the Commissioner should clarify that the Respondents here committed fraud under the Producer Act; and 3) the Commissioner should assess a $10,000.00 penalty for Count 3.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the Orders to Show Cause by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 67 N.J. 47 (1975).

OTSC – Allegations Against Respondents

The OTSC charges Respondents with violations of the Producer Act, which governs the licensure of New Jersey insurance producers and empowers the Commissioner to suspend or revoke the license of, and fine, an insurance producer for violations of its provisions. The ALJ found that the Respondents violated several provisions of the Producer Act as alleged in all four Counts of the OTSC.

Count One

Count One of the OTSC alleges that by transmitting a check that was not backed by the proper escrow funds, the Respondents committed the following violations of N.J.S.A. 17:22A-40a:

> (2) Violating any insurance laws, or violating any regulation, subpoena or order of the commissioner or of another state's insurance regulator;
>
> (8) Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere; and
>
> (16) Committing any fraudulent act.

Count One also alleges a violation of N.J.A.C. 11:17A-4.10, which states, "An insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business."

The ALJ found that failing to reconcile the escrow account for six months, that no one at Respondent Secure Title knew how to use the segment of the computer system that managed the trust-fund accounting, and that no one bothered to ascertain that Buono actually did deposit a valid check was financially irresponsible conduct in violation of N.J.S.A. 17:22A-40a(8), which prohibits financial irresponsibility. Initial Decision, supra, at *13.

In its Exceptions, the Department argues that the Initial Decision conflicts on whether or not this was fraud. In the Initial Decision Penalty section, the Initial Decision states that "this is not an instance of carefully premeditated fraud, but rather financial sloppiness rising to fiscal irresponsibility." Id. at *17-18. This contrasts with the Initial Decision's discussion regarding license revocation wherein it quotes that license revocation has consistently been imposed for those engaged in fraudulent acts. Id. at *21-22. I agree with the Department that Respondents' conduct constitutes fraud under the Producer Act.

A fraudulent act under the Producer Act does not require intent to deceive. Commissioner v. Shih, supra. Rather, fraud is defined as "[a] false representation of a matter of fact, whether by words or by conduct . . . or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury." Id. at 36.; see also Commissioner v. Capital Bonding Corp., supra.; Randall v. Sarris, OAL Dkt. Nos. BKI 2963-96 and BKI 8902-97, Initial Decision (06/25/98), Final Decision and Order (08/31/98). The record here establishes that Respondents knew or should have known that they issued a check to release escrow funds for which they did not have sufficient funds. This was not an isolated clerical error or innocent mistake. I concur with the ALJ that it was the result of Respondents' "ongoing knowledge of the shortage in the trust account." Initial Decision, supra, at *22. The issuance of the check constituted a fraudulent act and was contrary to their fiduciary obligations to segregate and hold escrow funds. I conclude, therefore, that Respondents violated N.J.S.A. 17:22A-40a(2), (8), (16) and N.J.A.C. 11:17A-4.10.

Count Two

Count Two of the OTSC alleges that Respondents failed to remit the escrow funds and used fraudulent, coercive and dishonest practices, demonstrated incompetence, untrustworthiness and financial irresponsibility in the conduct of business, in violation of N.J.A.C. 11:17C-2.2(c), which provides that "[a]ll title insurance settlement funds shall be disbursed within five business days after settlement except as determined by the parties at settlement." I concur with the ALJ that the Department proved the allegations in Count Two; and I find that Respondents violated N.J.A.C. 11:17C-2.2(c).

Count Three

Count Three of the OTSC alleges that Respondents failed to keep separate records of funds held in escrow, and commingled escrow funds with other funds held by the Respondent in another capacity, in violation of the following:

> N.J.S.A. 17:22A-40a(2): Violating any insurance laws, or violating any regulation, subpoena or order of the commissioner or of another state's insurance regulator;
>
> N.J.S.A. 17:22A-40a(8): Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere;
>
> N.J.S.A. 17:46B-10.1: Producer shall maintain a separate record of all receipts and disbursements of escrow funds, which shall be deposited in a separate trust or escrow account, and which shall not be commingled with other funds;
>
> N.J.A.C. 11:17A-4.10: A producer acts in a fiduciary capacity in the conduct of his insurance business; and
>
> N.J.A.C. 11:17C-2.1(a): All premium funds shall be held by an insurance producer in a fiduciary capacity and shall not be misappropriated, improperly converted to the insurance producer's own use, or illegally withheld by the licensee.

Respondents argue that they relied on Old Republic's auditor to audit their escrow account, and that their contract with Old Republic provided for such audits. The Initial Decision found this explanation to be a mitigating circumstance in assessment of the penalty.

Respondents misunderstand their responsibilities as licensed insurance producers, which act in a fiduciary capacity in the conduct of insurance business. N.J.A.C. 11:17A-4.10; Strawbridge v. New York Life Ins. Co., 504 F. Supp. 824 (D.N.J. 1980). Title insurance producers are required to maintain a separate record of all receipts and disbursements of escrow funds, which shall be deposited in a separate trust or escrow account, and which shall not be commingled with other funds. N.J.S.A. 17:46B-10.1. Similarly, all insurance producers are required to prepare and maintain a monthly reconciliation of their trust account. N.J.A.C. 11:17C-2.5(g). Respondents are not free to abdicate their responsibilities by relying upon a potential periodic audit by the insurer.

Moreover, the Respondents' agency agreement with Old Republic does not release Respondents from their statutory and regulatory responsibilities as argued by the Respondents. In fact, the agreement specifically acknowledges that it is the duty of Respondents to "reconcile all [trust] accounts not less frequently than monthly" as well as "[c]omply with all statutes and governmental rules and regulations relating to the licensing and operation of [Respondent Secure Title's] business." (P-29 at 1). The agreement also provides that Old Republic may, at its option, conduct audits of Respondents' accounts, but that escrow or settlement business is the responsibility strictly of Respondents. Id. at 3.

Respondents failed to properly safeguard the Homeowners' escrow funds and failed to reconcile the escrow account. Because of their failures, the Respondents were unable to properly account for and turn over escrow monies. I concur with the ALJ that the mere act of releasing a

check that was dishonored for insufficient funds did constitute illegally withholding funds. (Partial Summary Decision at 9). I conclude that the above conduct is in violation of N.J.S.A. 17:22A-40a(2) and (8); N.J.S.A. 17:46B-10.1; and N.J.A.C. 11:17A-4.10. I do not find a violation of N.J.A.C. 11:17C-2.1(a) as that provision governs insurance premiums, not escrow funds.

Count Four

Count Four of the OTSC alleges that Respondents failed to timely respond to the Department's two written inquiries, in violation of: N.J.S.A. 17:22A-40a(2) (violating any insurance law) and N.J.A.C. 11:17A-4.8 (a producer shall reply, in writing, to any inquiry of the Department within the time requested in the inquiry, or no later than 15 calendar days from the date the inquiry was made or mailed if no response time is given.)

The ALJ states that "the previous partial summary decision established that [Respondent] Hildebrandt did not respond within the fifteen-calendar-day timeframe." Initial Decision, supra, at *15. In their Exceptions, as they argued before the ALJ, Respondents argue that it was not a failure to cooperate because they did not respond pursuant to advice of counsel as there was a pending criminal investigation. Nevertheless, the ALJ found that Respondent Hildebrandt acknowledged that he never sent a response but the Department's investigator never pursued contacting his counsel. Initial Decision, supra, at *11.

I reject Respondents' argument that his reliance upon counsel absolved him of his obligation to respond to the Department's letters. As a licensee, the Respondents are not free to ignore a Department inquiry. It is a licensee's responsibility to understand and abide by the statutory requirements of the Producer Act, not his counsel. See Commissioner v. Pino, supra.; Suter v. Fiegoli, OAL Dkt. No. BKI 8589-00, Initial Decision (04/08/02), Final Decision and

Order (05/28/02) (finding that licensee's reliance on counsel, even if misplaced, does not absolve him of guilt for a failure to comply with the statutory requirements). Respondents should have responded to the Department's requests.

Penalty

With respect to the appropriate action to take against Respondents' insurance producer licenses, I find that the record is more than sufficient to support license revocation and, in fact, compels the revocation of their licenses. I concur with the ALJ's recommendation that the Respondents' licenses be revoked.

Our strong policy is to instill public confidence in both insurance professionals and the industry as a whole. In re Parkwood Co., 98 N.J. Super. 263 (App. Div. 1963). Courts have long recognized that the insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979). Insurance agents and brokers act in a fiduciary position. Strawbridge v. NY Life Insurance Company, supra. An insurance producer collects and holds money from insureds; thus, the qualities of trustworthiness, integrity, and compliance are of paramount importance to the insurance industry. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993).

In decisions by prior Commissioners in similar cases, revocation has consistently been imposed upon licensees who have engaged in misconduct involving fraud, misappropriation of premium monies, bad faith and dishonesty. Commissioner v. Fonseca, supra.; Commissioner v. Strandskov, OAL Dkt. Nos. BKI 03451-07 and BKI 03452-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); see also Commissioner v. Feliz, OAL Dkt. No. BKI 85-05,

Initial Decision (12/16/05), Final Decision on Remand (03/13/06) (license revocation, restitution and fines for failure to remit payment to the insurer or return premiums to insureds); Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision (07/09/07), Final Decision and Order (09/17/07) (license revocation and administrative fines for, among other things, failure to remit premiums and failure to maintain a trust account). Only in very rare cases involving extraordinary mitigating factors would it be appropriate to refrain from revoking the license of an insurance producer who has committed fraud. Bakke v. Goncalves, OAL Dkt. Nos. BKI 3188-03 and BKI 3301-05, Initial Decision (12/03/03), Final Decision and Order (05/24/04), On remand (02/15/06).

There are no extraordinary mitigating factors here that support the Respondents' retention of their insurance producer licenses. The need to protect the public far outweighs Respondents' justifications for issuing a check that was dishonored for insufficient funds, and for failing to maintain the Homeowners' funds separately and apart from other funds. The record establishes that Respondents had an ongoing knowledge of the shortage in the trust account, failed to reconcile the escrow account and issued a check of escrow funds that was returned for insufficient funds and I have found that the Respondents engaged in fraud under the Producer Act; when viewed in totality, license revocation is the appropriate penalty for Respondents' actions.

Under Kimmelman, certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed pursuant to N.J.S.A. 17:22A-45 upon insurance producers (up to $5,000 for the first violation and up to $10,000 for any subsequent violations). The factors include: (1) the good faith or bad of the violator; (2) the violator's ability to pay; (3) the amount of profit obtained from the illegal activity; (4) injury to the public; (5)

duration of the illegal conduct; (6) existence of criminal actions and whether a large civil penalty may be unduly punitive if other sanctions have been imposed; and (7) past violations. Kimmelman, supra, 108 N.J. at 137-139.

The record herein indicates the following with respect to these factors. Respondents demonstrated bad faith by failing to hold escrow funds in a fiduciary capacity, failing to properly reconcile the escrow account, issuing a check for escrow money that was returned for insufficient funds and failing to return approximately $18,000 in escrow funds. As to the second factor, the ALJ found that, while no evidence had been offered as to Respondents' ability to pay, Respondent Secure Title ceased doing business in 2008 and Respondent Hildebrandt is now back in college, both of which suggest a limited ability to pay. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Goldman v. Shah, supra. Regardless, an offender's ability to pay is, however, only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. See Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 4686-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from $2,500 to $20,000 even though the producer argued an inability to pay fines in addition to restitution.)

The third Kimmelman factor addresses the amount of profits obtained from the illegal activity. The greater the profits a defendant is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, supra, 108 N.J. 123 at 138. Respondents profited from their illegal activity by approximately $18,000, the amount that the Respondents withheld from the Homeowners and have not paid. It was Old Republic

who refunded the monies to the Homeowners. This factor weighs heavily in favor of a significant penalty.

Fourth, the Initial Decision correctly notes the tangible injury to the Homeowners and Mr. Azar by Respondents in that they had to take significant efforts to recover the escrow funds. In addition, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. Commissioner v. Fonseca, supra. Here, Respondents have eroded the confidence of New Jersey consumers in insurance producers and in the insurance business and this harm is cognizable when assessing the appropriate penalty.

I agree with the Department that the uncontested facts in the record demonstrate that the duration of the illegal activity was 23 months – the period time between which the trust account was first deficient when the alleged third party fraud occurred (January 2006) and when Respondents could not return the Homeowners' money (November 2007). There were no criminal charges brought against Respondents, and there have been no prior violations by Respondents.

As to Count Three, the Initial Decision found that Respondents' reliance on Old Republic's auditor to audit their escrow account, and Old Republic's failure to notice the missing funds for months to be a mitigating circumstance in assessment of the penalty. I reject this legal conclusion. As noted above, it is Respondents' statutory and fiduciary responsibility to reconcile their escrow account and safeguard the escrow monies. In addition, Respondents agency agreement with Old Republic did not erode those statutory and fiduciary obligations. Even if Respondents were defrauded by Buono, the Homeowners' escrow funds should have been

maintained separate and apart from other funds. Respondents' abdication of their statutory and fiduciary obligations are aggravating factors and weigh heavily in favor of a significant penalty.

In light of the above Kimmelman analysis and based on the violations I have concluded that Respondents committed, I concur with the recommendations of the ALJ that Respondents shall pay costs of $887.50, restitution to Old Republic of $5,523, and the fines for Count One ($2,000), Two ($3,000) and Four ($2,000) are fully warranted, not excessive or unduly punitive, and succeed to the required level of opprobrium. I MODIFY the Initial Decision, in part, to impose a $10,000 fine as to Count Three as requested by, and for the reasons asserted by, the Department.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions and the entire record herein, I hereby partially ADOPT the Findings and Conclusions as set forth in the Initial Decision. Specifically, I ADOPT the conclusions that Respondents violated the Producer Act as charged in the OTSC as was found therein. As to Count One of the OTSC, I FIND that Respondents violated N.J.S.A. 17:22A-40a(2), (8) and (16). As to Count Two of the OTSC, I FIND that Respondents violated N.J.A.C. 11:17C-2.2(c). As to Count Three of the OTSC, I FIND that Respondents violated N.J.S.A. 17:22A-40a(2) and (8), N.J.S.A. 17:46B-10.1, and N.J.A.C. 11:17A-4.10. As to Count Four of the OTSC, I FIND that Respondents violated N.J.S.A. 17:22A-40a, and N.J.A.C. 11:17A-4.8.

I also ADOPT the ALJ's recommendation to revoke the Respondents' producer licenses. Further, I ADOPT the ALJ's recommendations that Respondents be ORDERED to pay fines of $7,000 for the violations set forth in Counts One ($2,000), Two ($3,000) and Four ($2,000) of the OTSC; costs of $887.50; and restitution to Old Republic of $5,523. I MODIFY the Initial

Decision as to the fines for Count Three of the OTSC and impose a fine of $10,000 for the violations as set forth in Count Three.

It is so ORDERED this 4th day of June, 2015.

Kenneth E. Kobylowski
Commissioner

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